United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by FREDERICK H. COHN

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 73 C 1288

In the Matter of the Application of

CHARLES J. LANTZ,

Petitioner-Appellant

-v-

ROBERT C. SEAMANS, JR., Secretary of the Air Force,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF AND ADDENDUM FOR APPELLANT

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STATEMENT OF THE CASE

This is an appeal from the dismissal of a petition for a writ of habeas corpus brought under the jurisdiction of 28 U.S.C. §2241 on the basis that the denial of the petitioner's application for conscientious objector status was irrational and unsupported by the record. U.S. ex rel Checkman v. Laird, 469 F.2d 773 (2nd Cir. 1972).

The District Court dismissed solely upon jurisdictional grounds relying upon its interpretation of Strait v. Laird, 406 U.S. 341 (1972), in light of the traditional background of habeas corpus actions as demonstrated by Schlanger v. Seamans, 401 U.S. 487 (1971). The Court chose to disregard Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C.Cir. 1973), and United States ex rel Applebaum v. Seamans, 365 F.Supp. 1177 (S.D.N.Y. 1973) as not binding upon their decision.

The Court executed a certificate of probable cause.

FACTS

The petitioner is an attorney at law currently working for the Legal Aid Society, Criminal Branch, White Plains, New York. At the time the petition for writ of habeas corpus was brought, he was working for the Criminal Branch of the Legal Aid Society in Queens County, New York City, and resided at 73-08 199th Street, Flushing, New York. (App. 2a)

While in college, the petitioner had been in the Reserve Officers Training Corp for the United States Air Force and his activation was deferred so that he might attend law school and receive a degree. (App. 3a) During the period of his law school studies, the petitioner became a conscientious objector and at the earliest possible date submitted an application for discharge as a conscientious objector. (App. 3a) Over a year after the submission of that petition, the appellant was afforded a hearing as required by AFR 35-24. Eight months after that hearing, a letter from the Department of the Air Force denying discharge as a conscientious objector was received stating as the grounds "...you have not demonstrated that your beliefs are

sincere and deeply held." (App. 3a, 4a and 7a). Shortly after receiving that ruling, a petition for a writ of habeas corpus was filed, (App. 2a-6a) and on September 28, 1973 over a month after filing of the petition for writ of habeas corpus, a motion to dismiss was brought on by the Respondent-Appellee before Hon. Judge Mark A. Constantino (App. 48a). Briefs were filed and on January 30, 1974, after a period of some three and a half months during which time the activation of the petitioner was informally stayed, the Court granted the motion to dismiss. (App. 50a-54a).

ARGUMENT

POINT I

JURISDICTION OF THE PETITION FOR A WRIT OF HABEAS CORPUS IS PROPERLY IN THE EASTERN DISTRICT OF NEW YORK.

This case comes to this court as the inevitable progeny of a long line of cases involving reservists seeking to be released from their obligation from active duty because of late blooming claims to conscientious objector status. See Strait v. Laird, 406 U.S. 341 (1972), Schlanger v. Seaman, 401 U.S. 487 (1971). As a result of this litigation and other litigation in the rapidly expanding field, the concept of jurisdiction of writs of habeas corpus have been rapidly expanded. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). As our courts have recognized more and more that the writ of habeas corpus is a writ with application to persons who fit a less restrictive definition of being in custody, the proper jurisdiction or place of bringing the writ became more and more open to re-definition. See Jones v. Cunningham, 371 U.S. 236 (1963). The most recent pronouncement of the Supreme Court of the United States in terms of habeas corpus jurisdiction, while dealing with the claims

of state prisoners as opposed to the claims of reservists, tracks the history and policy considerations which have made habeas corpus jurisdiction litigation an area of continual expansion. Braden v. 30th Judicial Circuit Court of Kentucky, supra. Tracking back to Ahrens v. Clark, 335 U.S. 188 (1948), the Court traces the juridical philosophy which has led to the District Court in this case applying a modification of a rather strict rule that a writ of habeas corpus may be granted by the District Court within its respective jurisdiction. The Court, in Braden, stressing a new concept of flexibility says the following:

> In view of these developments since Ahrens v. Clark, we can no longer view that decision as establishing an inflexible, jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision. (footnote omitted). Of course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims. On the facts of Ahrens itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District

> of Columbia. Under these circumstances, traditional principles of venue would mandate the bringing of the action in the Eastern District of New York, rather than the District of Columbia. Ahrens v. Clark stands for no broader proposition. (Braden, 93 S.Ct. 1123, at 1132)

The court below refused to be influenced by the recent cases Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C.Cir. 1973) and United States ex rel Applebaum v. Seamans, supra, which held that domicile was the determining factor in the habeas corpus actions of an inactive reservists, the Court chose to follow a strict interpretation of Strait v. Laird, supra. The court below held that Strait "viewed against the traditional background for determing the proper forum" made an exception only when there were "meaningful military contacts with the forum." (Opinion below, at 4) (App. 53a)

This strict, if not regressive, approach to Strait viewing it as an aberration in the history of habeas corpus law, though understandable in light of the complex nature of that development, is not correct. What the traditional background of habeas corpus indeed shows is concern with the notions of "custody" and "custodian" only insofar as they aid the ultimate policy determination of the best forum.

Federal statute provides that the federal courts may grant the writ of habeas corpus to those "in custody under or by

color of the authority of the United States." 28 U.S.C. §2241 (c)(1). It does not, however, name the appropriate jurisdictions for actions such as this, nor does it define "custody" or give rules for determining the "custodian." The courts have responded to this void by developing their own rules and formulas to the particular situations of those petitioning for The Great Writ. The interests which the courts in the past have seemed to weigh are:

> First, the forum should be close to the records of the case and to the witnesses who may have to appear. Second, the choice should promote a fair distribution of habeas cases among all the district courts rather than concentrating the burden on a few. Third, the forum should be close to the prisoner in order to minimize the difficulty in transporting him to the courtroom. And finally, it should be close enough to the prisoner to facilitate communication between him and his attorney.
>
> Developments in the Law--Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1160-1161 (1970)

In the beginning only those in actual custody could bring habeas actions. In Wales v. Whitney, 114 U.S. 564 (1885) a naval officer confined by his superior to the Washington D.C. area was denied access to the habeas action:

> Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. (Id., at 571-572)

Therefore, by definition, the jurisdiction where the petitioner was restrained would also be the custodian's. A forum having both jurisdiction over the custodian and the petitioner in custody would fulfill all policy considerations, and thus, in early cases, the problem of defining those terms did not need to be faced.

The Supreme Court in Ahrens v. Clark, supra, was concerned with the difficulty of transporting 120 Germans held on Ellis Island to the District Court in Washington D.C., and this concern led them to not even reach the question of who was the "immediate custodian." The location of the petitioners was determinative of the proper forum. The Court held that

> Thus the view that the jurisdiction of the District Court (Washington, D.C.) to issue the writ in cases such as this is restricted to those petitioners who are confined or detained within the territorial jurisdiction of the court is supported by...considerations of policy...." (Ahrens, supra at p. 192)

Thus the court decided upon the basis of overriding policy (the problem of transportation)and adapted statutory language to those considerations.

It was not until 1963 with Jones v. Cunningham, supra, that the Supreme Court recognized moral and legal restraints as sufficient custody for purposes of habeas corpus actions.

> It (the Great Writ) is not now and has never been a static, narrow, formalistic remedy; it's scope has grown to achieve its grand purpose--the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. (Jones, supra at p.243)

In Jones even though the petitioner was on parole and not under physical restraint, and even though the petitioner had left the territorial jurisdiction of the District Court (by moving to Georgia to live with his family), the court still upheld the jurisdiction of the court to hear the habeas corpus action.

Thus the court in Ahrens v. Clark, supra, chose to depart from the traditional notions of the need for immediate custodianship in favor of policy considerations of safety and convenience; and the court in Jones v. Cunningham, supra, similarly departed from the traditional notion of "custody" in order to support the even more traditional and important judicial notion of the need to protect the rights of the individual. This demonstrates that it is indeed policy which controls "custody" and "custodian."

The need for and practice of policy considerations determining jurisdiction is even more clear in the area of the inactive reservist's application for a writ of habeas corpus. The inactive reservist presents a difficult conceptual problem

for habeas actions. He is under no physical restraints and thus the term "custody" becomes rather amorphous. Unable to determine where "custody" lies, some have been tempted to turn instead to where the "custodian" resides in order to determine jurisdiction. This is an academic rather than practical attempt to deal with the problem, as Eisel v. Secretary of the Army, supra, states.

> It is not surprising that one who is in "custody" only in the most metaphorical sense would also have a "custodian" that partakes of the chimerical. (supra, p. 1261)

The court in Strait v. Laird, supra, refused to get caught up in the futile search for the proper custodian, to exalt fiction over reality by holding that the commanding officer of a huge personnel center was the custodian for the purposes of jurisdiction. The Strait court quotes Arlen v. Laird, 451 F.2d 684 (1971)

> "Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists. To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only within one small geographical area is to ignore reality." (Id., at 687.)

Rather than ignore the realities of the situation, the court in Strait gives four criteria for the determination of the proper forum: (1) where the petitioner's home is; (2) whether or not the petitioner has been on active duty; (3)where the petitioner has received his commission; and (4) where the petitioner has made his application for release.

Since the petitioner in Strait had never been on active duty and the other three tests all took place in California, the Court held that that was the proper forum for the action.

The Strait decision does not "abandon" Schlanger v. Seamans, supra. In that case the Supreme Court required that an enlisted man on temporary duty orders must bring his habeas corpus action in the district where his commanding officer resides. In that case, the petitioner had been on active duty and thus had a commanding officer who was not a mere fiction. Moreover, Schlanger's home was not in the jurisdiction where he brought the action as he was there only temporarily for an educational project. It has never been the policy of any court that mere presence in a jurisdiction is enough to bring an action of habeas corpus.

Strait v. Laird, supra, officially determined for the first time that an inactive reservist had standing to bring an action for a writ of habeas corpus. And for the purposes of that particular fact situation in that case, its four factor test neatly disposed of the issue of jurisdiction. The case at hand presents

a different problem in that the petitioner does not fulfill all the factors of the Strait test. As Eisel v. Secretary of the Army points out

> The Court in Strait did not tell us which of the several factors it considered were determinative there. (Id., at 1264)

Eisel is a case on all fours with the case at hand. In Eisel the petitioner filed his conscientious objector application while he was attending school and living in Cambridge, Massachussetts. Upon graduation from school, he moved to him home in New York. The Eisel court, in a long opinion which went beyond deciding that there was no jurisdiction in the District of Columbia to identifying the proper forum for Eisel to bring his action as New York, his domicile.

The Eisel court concluded, as Strait and Arlen had, that policy rather than attempts at locating enigmatic "custody" or "custodians" should be controlling.

> Where inactive reservist may or may not bring habeas actions is better determined by analyzing the policies for and against allowing an action in a particular jurisdiction, rather than by the blind incantation of words with implied magical properties, such as "immediate custodian." (Eisel, at 1254).

The Eisel court also avoided adopting a rule that the forum where the petitioner has his "most significant contacts" was the only forum.

> It would be possible to establish a rule that held the forum to be where the serviceman had his most significant contacts with the military. Such a choice has the rather obvious disadvantage, however, of being vague and easily subject to misinterpretation. It may well be that an inactive reservist may have contacts with the military in a number of different places. Deciding where the place of the "most significant contacts" is might be as difficult as finding the mythical "immediate custodian." (Id., at 1264.)

Eisel, instead, follows the lead of Strait v. Laird, supra, and presents a multifactor test to determine jurisdiction and through implementing that test, concludes that the domicile of the petitioner should be the determinative factor in deciding the proper forum.

The first interest that must be considered according to Eisel is that the forum should be close to the records of the case and to the witnesses that have to appear. In military reserve habeas corpus actions, the hearing is based entirely upon the written record which is usually already before the court, and if not is at the least simpler to move than the petitioner. (c.f. U.S. ex rel Applebaum v. Seaman, 365 F.Supp. 1177 (1973), and Ahrens v. Clark, 335 U.S. 188 (1948).

The second factor of the test is that the forum chosen should provide a fair distribution of habeas corpus actions. To force all petitioners in the same situation as the petitioner in this case to go to the jurisdiction of their nominal commanding officer "would result in concentration of cases in the district in which the Reserve Officer Components Personnel Center is located." Donigan v. Laird, 308 F. Supp. 449 (1969) at 453. Since the military draws its personnel from all areas of the nation, it would be most reasonable that the domicile of the petitioner would provide the best opportunity to fairly distribute these cases and avoid a heavy concentration in a few areas.

The third interest is that the forum should be one before which it is convenient for the petitioner to appear. The court in Arlen v. Laird, 451 F.2d 684 (1971) saw the inconvenience and basic injustice in forcing a petitioner to bring his action away from his residence:

> The suggested procedure would force the petitioner to leave his home and his work in order to contest the power of the army to force him to do so. (Id., at 687)

The convenience of the government is the fourth interest in the Eisel test, but as Arlen v. Laird, supra, again points out:

> The government has no substantial interest in having a district court in Indiana (or Louisiana) hear this petition. The Government has abundant counsel in this jurisdiction and records can easily be forwarded. (Id., at 687)

Nor does the government have any interest in having the District Court in Maryland hear the petition, nor is there any logical basis other than the petitioner's convenience for such a forum.

> ...there is little reason to require an unattached, inactive reservist to sue where his interviews have taken place. The writ would not issue against the commanding officer of the base where the application was processed but rather against the respondents. (footnote omitted)
>
> A requirement that an inactive reservist sue in the district in which his interviews took place rather than in the district in which he resides would seemingly have to be based on an assumption that the district where the processing of the application commenced would be a more convenient forum for the parties. (United States ex rel Applebaum, supra, at 1180, 1181)

In the case at hand, though, Maryland is of little more convenience for the petitioner than Colorado.

The fifth factor is that the forum should be easily determinable. This factor demonstrates the real effort of the Eisel court to move beyond the quagmire of determining "custodianship" or "most significant contacts" without plunging into a mechanistic bog which might result in hardship and injustice. Eisel v. Secretary of the Army 477 F.2d 1251 (D.C.Cir. 1973) states in support of domicile as the best solution to this factor of the test:

> There are of course situations in which the exact location of a person's domicile is unclear. Such situations are relatively uncommon; they are certainly not as difficult of resolution as the alternatives that have been suggested to us. In addition, our judicial system is familiar with the concept of domicile--the problem has arisen in the context of decedents' estates, divorce, and taxation--and there will be a body of law that courts can draw upon to resolve controversies. (Id., at 1265)

The sixth factor is that "to the extent possible there should be a single exclusive forum in order to prevent forum shopping among alternatives." (Eisel, at 1254) A person is normally only allowed to have one domicile. As we have seen in Schlanger v. Seamans, 401 U.S. 487 (1971), mere presence in a jurisdiction is not enough, so a petitioner could not forum shop simply by moving from place to place. Petitioner

in this case is clearly not forum shopping. He is well established in the jurisdiction and moved before knowing he would have to litigate the matter of the denial of his application for conscientious objector status.

Indeed, the above analysis indicates that domicile is the only factor of any import to be considered. Each other factor in the case of an inactive reservist is so insubstantial as to be almost invisible. If the purpose of habeas corpus litigation in this area is to make the litigation as even-handed to the petitioner as possible, and as convenient to the Courts and Government as may be practicable, then in cases such as this where all litigation is determined on papers easily transferable by the districts, there is absolutely no interest in having the writ determined in any other area but the domicile of the petitioner.

CONCLUSION

THE DECISION OF THE COURT BELOW SHOULD BE REVERSED AND THE CASE REMANDED FOR DETERMINATION ON THE MERITS.

Respectfully submitted,

May 1st, 1974

Frederick H. Cohn

FREDERICK H. COHN, ESQ.

CERTIFICATE OF SERVICE:

I certify that two copies of the foregoing brief and addenda thereto and the accompanying appendix have been served on the Honorable Edward Boyd, Acting United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, by causing them to be deposited in the mail this 2nd day of May, 1974.

Frederick H. Cohn

ADDENDUM TO BRIEF

AFR 35-24

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 35-24

18 October 1971

Military Personnel

DISPOSITION OF CONSCIENTIOUS OBJECTORS

This regulation establishes uniform Air Force procedures governing an applicant who claims status as a conscientious objector. The regulation applies to all personnel of the Air Force and of its Reserve components. It is not an authority for discharge and may not be cited as such. It implements DOD Directive 1300.6, 20 August 1971.

Proposed supplements which affect any function of a CBPO/CRPO will be processed according to AFR 5-13.

Supersedes AFR 35-24, 1 May 1970. (For summary of revised, deleted, or added material, see signature page.)

OPR: DPMAKP

DISTRIBUTION: S

SECTION A—GENERAL INFORMATION

1. Terms Explained. The following terms apply for this regulation.

a. Conscientious Objection. General — A firm, fixed, and sincere objection to participation in war in any form or the bearing of arms by reason of religious training and belief.

(1) *Class 1–0 Conscientious Objector.* A member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

(2) *Class 1–A–0 Conscientious Objector.* A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a noncombatant status.

Unless otherwise specified, the term "conscientious objector" includes both 1–0 and 1–A–0 conscientious objectors.

b. Religious Training and Belief. Belief in an external power or being or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or being need not be of an orthodox diety, but may be a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of another, or, in the case of deeply held moral or ethical beliefs, a belief held with the strength and devotion of traditional religious conviction. The term "religious training and belief" may include solely moral or ethical beliefs even though the applicant himself may not characterize these beliefs as "religious" in the traditional sense, or may expressly characterize them as not religious. The term "religious training and belief" does not include a belief which rests solely upon considerations of policy, pragmatism, expediency, or political views.

c. Noncombatant Service or Noncombatant Duties (1–A–0) (used interchangeably herein):

(1) Service in any unit of the armed forces which is unarmed at all times.

(2) Service in the medical department of any of the armed forces, wherever performed.

(3) Any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

(4) Service aboard an armed ship or aircraft or in a combat zone will not be considered to be combatant duty unless the individual concerned is personally and directly involved in the operation of weapons.

d. Noncombatant Training. Any training which is not concerned with the study, use, or handling of arms or weapons.

2. Disposition of Applications Pending. Applications initiated under AFR 35–24, 1 May 1970, and dated prior to 18 October 1971, will be processed to conclusion under that regulation.

SECTION B—POLICY

3. National Policy. Military service is a

patriotic obligation of every citizen who desires to share in the benefits and protections afforded by allegiance to the national aims, objectives, welfare, and security of the Government of the United States. The armed forces were established by Congress as an instrument to insure the attainment of the objectives through the preservation of peace and national stability in a highly competitive and changing world. Nevertheless, Congress has recognized that deep and sincerely held convictions against the use of force may place any citizen in a dilemma between conscience and patriotic obligation, and has therefore provided a means whereby these citizens may be excused from their military obligation by receiving status as a conscientious objector.

4. Department of Defense (DOD) Policy. Consistent with the national policy explained above, Air Force personnel who qualify under this regulation as bona fide conscientious objectors will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized as grounds for conscientious objection. This policy will be executed subject to the following:

a. Administrative discharge prior to the completion of an obligated term of service is discretionary with the Secretary of the Air Force, based on a judgment of the facts and circumstances in the case. However, insofar as may be consistent with the effectiveness and efficiency of the Air Force, a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable within the following limitations:

(1) Except as provided in paragraph (2) below, no member of the Air Force who possessed conscientious objection beliefs before entering military service is eligible for classification as a conscientious objector if:

(a) Such beliefs satisfied the requirements for classification as a conscientious objector pursuant to Section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App 456(j)) and other provisions of law, *and*

he failed to request classification as a conscientious objector by the Selective Service System (SSS); or

(b) He requested classification as a conscientious objector before entering military service, *and*

such request was denied on the merits by the SSS, *and*

his request for classification as a conscientious objector is based upon essentially the same grounds or supported by essentially the same evidence, as the request which was denied by the SSS.

(2) Nothing contained in this regulation renders ineligible for classification as a conscientious objector a member of the Air Force who possessed conscientious objector beliefs before entering military service if:

(a) Such beliefs crystalized after receipt of an induction notice;

(b) He could not request classification as a conscientious objector by the SSS because of SSS regulations prohibiting the submission of such requests after receipt of induction notice; and

(c) He makes application for classification as a conscientious objector within 72 hours after his induction.

b. Because of the personal and subjective nature of conscientious objection, the existence, honesty, and sincerity of asserted conscientious objection beliefs cannot be routinely ascertained by applying inflexible objective standards and measurements on an "across-the-board" basis. Requests for discharge or assignment to noncombatant training or service based on conscientious objection will, therefore, be handled on an individual basis with final determination made at HQ USAF (airmen) or the Secretary of the Air Force (officers) in accordance with the facts and circumstances in the particular case and the policy and procedures set forth herein.

SECTION C—CRITERIA

5. General. The criteria set forth herein provide policy and guidance in considering applications for separation or for assignment to noncombatant training and service based on conscientious objection.

a. Consistent with the national policy to recognize the claims of bona fide conscientious objectors in the military service, an application for classification as a conscientious objector may be approved (subject to the limitations of paragraph 4a) for any individual:

(1) Who is conscientiously opposed to participation in war in any form;

(2) Whose opposition is found on religious training and belief; and

(3) Whose position is sincere and deeply held.

b. War in Any Form. The clause "war in any form" should be interpreted in the following manner:

(1) An individual who desires to choose the war in which he will participate is not a conscientious objector under the law. His objection must be to all wars rather than a specific war;

(2) A belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in "war" within the meaning of this regulation.

c. Religious Training and Belief:

(1) In order to find that an applicant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious convictions, the applicant must show that these moral and ethical convictions, once acquired, have directed his life in the way traditional religious convictions of equal strength, depth and duration have directed the lives of those whose beliefs are clearly found in traditional religious convictions. In other words, the belief upon which conscientious objection is based must be the primary controlling force in the applicant's life.

(2) A primary factor to be considered is the sincerity with which the belief is held. Great care must be exercised in seeking to determine whether asserted beliefs are honestly and genuinely held. Sincerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present. Care must be exercised in determining the integrity of belief and the consistency of application. Information presented by the claimant should be sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate that expediency or avoidance of military service is not the basis of his claim.

(a) Therefore, in evaluating applications the conduct of applicants, in particular their outward manifestation of the beliefs asserted, will be carefully examined and given substantial weight.

(b) Relevant factors that should be considered in determining an applicant's claim of conscientious objection include training in the home and church; general demeanor and pattern of conduct; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; credibility of the applicant, and credibility of persons supporting the claim.

(c) Particular care must be exercised not to deny the existence of bona fide beliefs simply because those beliefs are incompatible with one's own.

1. Church membership or adherence to particular theological tenets are not required to warrant separation or assignment to noncombatant training and service for conscientious objectors.

2. Mere affiliation with a church or other group which advocates conscientious objection as a tenet of its creed is not necessarily determinative of an applicant's position or belief.

3. Conversely, affiliation with a church or group which does not teach con-

scientious objection does not necessarily rule out adherence to conscientious objection beliefs in any given case.

4. Where an applicant is or has been a member of a church, religious organization, or religious sect, and where his claim of conscientious objection is related to such membership, inquiry may properly be made as to the fact of membership, and the teaching of the church, religious organization, or religious sect, as well as the applicant's religious activity. However, the fact that the applicant may disagree with, or not subscribe to, some of the tenets of his church does not necessarily discredit his claim. The personal convictions of each individual will be controlling so long as they derive from his moral, ethical, or religious beliefs.

5. Moreover, an applicant who is otherwise eligible for conscientious objector status may not be denied that status simply because his conscientious objection influences his view concerning the nation's domestic or foreign policies. The task is to decide whether the beliefs professed are sincerely held, and whether they govern the claimant's actions both in word and deed.

d. The burden of establishing a claim of conscientious objection as a ground for separation or assignment to noncombatant training and service is on the applicant. To this end, he must establish by clear and convincing evidence:

(1) That the nature or basis of his claim comes within the definition of and criteria prescribed herein for conscientious objection, and

(2) That his belief in connection therewith is honest, sincere and deeply held.

The claimant has the burden of determining and setting forth the exact nature of his request; that is, whether for separation based on conscientious objection (1-0) or for assignment to noncombatant training and service based on conscientious objection (1-A-0).

e. An applicant claiming 1-0 status will not be granted 1-A-0 status as a compromise.

f. Persons who were classified 1-A-0 by Selective Service prior to induction will upon induction be transferred to a training center, or station, for recruit training and will be subject to noncombatant service and training. They will be required to sign and date a statement as set forth in the form attached hereto as attachment 3. Thereafter, upon completion of recruit training, they will be assigned to noncombatant duty. They may be transferred to the medical corps, or a medical department or unit for further training, provided they meet the requirements therefor. Such persons when assigned to medical units will not be allowed to avoid the important or hazardous duties which are part of the responsibility of all members of the medical organization. Any person who does not meet the requirements for this training, who fails to complete the prescribed course of instruction, or who otherwise cannot be assigned to this duty will be assigned to other noncombatant duties.

NOTE: Because the Air Force does not normally induct members claiming conscientious objector status, this DOD policy is for information only.

g. Commanders are authorized to return to an applicant, without action, any second or subsequent application that is based upon essentially the same grounds, or supported by essentially the same evidence, as a previous application disapproved by the Secretary of the Air Force or HQ USAF.

h. The provisions of this regulation will not be used to effect the administrative separation of individuals who do not qualify as conscientious objectors, or in lieu of administrative separation procedures such as those provided for unsuitability or unfitness or as otherwise set forth in other Air Force directives. Individuals determined not qualified for conscientious objector status, but the separation of whom would otherwise appear to be in the best interest of the Air Force, should be considered for administrative separation under the provisions of other applicable Air Force directives. Under no circumstances will administrative separation of

these individuals be effected pursuant to this regulation.

i. Nothing in this regulation prevents the administrative elimination, pursuant to law and regulations of the Air Force of any officer whose classification as a 1–A–0 conscientious objector results in substandard performance of duty or other cause for elimination.

SECTION D—PROCEDURES

6. Preparation of Application. A member of the Air Force who seeks either separation or assignment to noncombatant duties by reason of conscientious objection will submit an application therefor through his unit commander to the CBPO-Special Actions (SA) unit. The applicant will indicate whether he is seeking a discharge or assignment to noncombatant duties and will include the following items:

a. The personal information required by attachment 1.

b. Any other items which the applicant desires to submit in support of his case.

c. Applicants for 1–A–0 status will not be processed unless accompanied by a voluntary request for separation in accordance with paragraph 3–8r, AFM 39–10 (airmen) or paragraph 16m, AFR 36–12 (officers). Such requests by the applicant will be submitted by letter in the format prescribed in attachment 3. The request will be signed and dated by the applicant and made a part of the application prior to forwarding to the commander exercising special court-martial jurisdiction.

7. Advice to Applicant. Prior to processing the application the unit commander will:

a. Advise the applicant of the specific provisions of section 3103 of Title 38, United States Code (see note) regarding the possible effects of discharge as a conscientious objector who refuses to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, and

b. Require the applicant to execute the statement attached as attachment 2.

NOTE. 38 U.S.C. 3103 provides, in pertinent part, that the discharge of any person on the grounds that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, will bar all rights (except government insurance) of such persons under law administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane.

8. Promotion of Personnel Who Apply for Conscientious Objector Status. Upon initiation of action under AFR 35–24, personnel awaiting promotion to all grades, both officers and airmen, will have promotion withheld in accordance with current procedures. The rationale for withholding promotion is that, by application, the individual places himself in a position where his potential for future service is questionable. Withholding will be in effect until a final determination can be made in individual cases. This policy complements the promotion philosophy that promotions are not awarded for past performance but for anticipated future service.

9. Required Chaplain and Psychiatric Interviews. The applicant will be personally interviewed by a chaplain who will submit a written opinion as to the nature and basis of the applicant's claim, and as to the applicant's sincerity and depth of conviction. The chaplain's report must include the reasons for his conclusions. In addition, the applicant will be interviewed by a psychiatrist (or by a medical officer if a psychiatrist is not reasonably available) who will submit a written report of psychiatric evaluation indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels, or such character or personality disorder as to warrant recommendation for

appropriate administrative action. This opinion and report will become part of the case file. If the applicant refuses to participate or is uncooperative or unresponsive in the course of the interviews, this fact will be included in the statement and report filed by the chaplain and psychiatrist or medical officer.

10. Appointment of Investigating Officer. The commander exercising special court-martial jurisdiction over the applicant will appoint an officer in the grade of major or higher, to investigate the applicant's claim.

(*NOTE:* Staff judge advocates in the grade of captain or higher may be appointed as investigating officers). The officer so appointed will not be an individual in the chain of command of the applicant. If the applicant is a commissioned officer, the investigating officer must be senior in both temporary and permanent grades to the applicant.

a. Review of AFR 35-24 by Investigation Officer. Upon appointment, the investigating officer will review this regulation. During the course of his investigation, the investigating officer will obtain all necessary legal advice from the local staff judge advocate or legal officer.

b. Conduct of Hearing by Investigating Officer. The investigating officer will conduct a hearing on the application. The purpose of the hearing is to afford the applicant an opportunity to present any evidence he desires in support of his application; to enable the investigating officer to ascertain and assemble all relevant facts; to create a comprehensive record; and to facilitate an informed recommendation by the investigating officer and an informed decision on the merits by higher authority. In this regard, any failure or refusal of the applicant to submit to questioning under oath or affirmation before the investigating officer may be considered by the officer making his recommendation and evaluation of the applicant's claim. If the applicant fails to appear at the hearing without good cause, the investigating officer may proceed in his absence and the applicant will be deemed to have waived his appearance.

(1) If the applicant desires, he will be entitled to be represented by counsel, at his own expense, who will be permitted to be present at the hearing, assist the applicant in the presentation of his case, and examine all items in the file.

(2) The hearing will be informal in character and will not be governed by the rules of evidence employed by courts-martial except that all oral testimony presented must be under oath or affirmation. Any relevant evidence may be received. Statements obtained from persons not present at the hearing need not be made under oath or affirmation. The hearing is not an adversary proceeding.

(3) The applicant may submit any additional evidence that he desires (including sworn or unsworn statements) and present any witnesses in his own behalf, but he will be responsible for securing their attendance. The commander exercising special court-martial jurisdiction will render all reasonable assistance in making available military members of his command requested by the applicant as witnesses. Further, the applicant will be permitted to question any other witnesses who appear and to examine all items in the file.

(4) A verbatim record of the hearing is not required. If the applicant desires such a record and agrees to provide it at his own expense, he may do so. If he elects to provide such a record, he must make a copy thereof available to the investigating officer, at no expense to the government, at the conclusion of the hearing. In the absence of a verbatim record, the investigating officer will summarize the testimony of witnesses and permit the applicant or his counsel to examine the summaries and note for the record their differences with the investigating officer's summary. Copies of statements and other documents received in evidence will be made a part of the hearing record.

11. Investigating Officer's Report. At the conclusion of the investigation, the investigating officer will prepare a written report which will contain the following:

a. A statement as to whether the applicant appeared, whether he was accompanied by counsel, and, if so, the latter's identity, and whether the nature and purpose of the hearing were explained to the applicant and understood by him.

b. Any documents, statements, and other material received during the investigation.

c. Summaries of the testimony of the witnesses presented (or a verbatim record of the testimony if such record was made).

d. A statement of the investigating officer's conclusions as to the underlying basis of the applicant's conscientious objection and the sincerity of the applicant's beliefs, including his reasons for such conclusions.

e. Subject to paragraph 5e, the investigating officer's recommendations for disposition of the case, including his reasons therefor. The actions recommended will be limited to the following:

(1) Denial of any classification as a conscientious objector; or,

(2) Classification as 1–A–0 conscientious objector; or,

(3) Classification as 1–0 conscientious objector.

f. The investigating officer's report, along with the individual's application, all interviews with chaplains or doctors, evidence received as a result of the investigating officer's hearing, and any other items submitted by the applicant in support of his case will constitute the record. The investigating officer's conclusions and recommended disposition will be based on the entire record and not merely on the evidence produced at the hearings. A copy of the record will be furnished to the applicant at the time it is forwarded to the commander who appointed the investigating officer, and the applicant will be informed that he has the right to submit a rebuttal to the report within 15 days after receipt of his copy of the record.

12. Forwarding of Application. Fifteen days after date the applicant was provided his copy of the record (paragraph 11f) or upon receipt of his rebuttal, whichever is sooner, CBPO–SA will forward the record case to the local staff judge advocate for legal review. If necessary, the SJA may return the case through CBPO–SA to the investigating officer for further investigation. When the record is complete, the SJA will forward it to the commander who appointed the investigating officer. That commander will forward it with his personal recommendation for disposition, and reasons therefor, through each level in the chain of command. At each level, additional recommendations will be attached. The last level in the chain of command will send at least two copies to USAFMPC/DPMAKE (airmen) or USAFMPC/DPMAKO (officers), Randolph AFB TX 78148, in accord with AFM 39–10 or AFR 36–12.

13. Action at Decision Level. A final decision based on the entire record will be made by the Secretary of the Air Force (officers) and HQ USAF (airmen). Any additional information other than the official service record of the applicant considered by the Secretary of the Air Force or HQ USAF which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant will be given a 15 day opportunity from date of receipt of the additional information to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.

14. Effect of Unauthorized Absence of Applicant. Processing of applications need not be abated by the unauthorized absence of the applicant subsequent to the initiation of the application, or by the institution of disciplinary action or administrative separation proceedings against him. However, an applicant whose request for classification as a conscientious objector has been approved will not be discharged until all disciplinary action has been resolved.

15. Status of Applicant Whose Request Is Under Consideration. To the extent prac-

ticable under the circumstances, during the period applications are being processed and until a decision is made by the Secretary of the Air Force or HQ USAF, every effort will be made to assign applicants to duties within the command to which they are assigned which will conflict as little as possible with their asserted beliefs. However, members desiring to file application who are on orders for reassignment are required to submit applications at their next permanent duty station. During the period applications are being processed, applicants will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Applicants may be disciplined for violations of the Uniform Code of Military Justice while awaiting action on their applications.

SECTION E—ACTIONS AFTER DECISION

16. Disposition Instructions When 1–0 Status Is Approved. Applicants requesting discharge who are determined to be 1–0 conscientious objectors will be discharged for the convenience of the Government with entry in personnel records and discharge papers that the reason for separation is conscientious objection. The type of discharge issued will be governed by the applicant's general military record and the pertinent provisions of AFM 39–10 (airmen) or AFR 36–12 (officers). The Director of the Selective Service System will be promptly notified of the discharge of those who have served less than 180 days in the armed forces. Pending separation, the applicant will continue to be assigned duties providing the minimum practicable conflict with his professed beliefs and will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which he is assigned. Applicants may be disciplined for violations under the Uniform Code of Military Justice while awaiting discharge.

17. Disposition Instructions When 1–A–0 Status Is Approved. Applicants requesting assignment to noncombatant duties who are determined to be class 1–A–0 conscientious objectors by the Air Force will be:

a. Assigned to noncombatant duty as stated in paragraph 1, or

b. Discharged from military service at the discretion of HQ USAF (airmen) or SAF (officers). Each applicant will be required to execute the statement at attachment 3.

18. Assignment to Noncombatant Duties. Persons assigned to noncombatant duties, and persons assigned to normal military duties by reason of disapproval of their application, will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Violations of the Uniform Code of Military Justice by these members will be treated as in any other situation.

19. Record of Entry To Make. If a member is discharged as a conscientious objector, items 11c, and 15, DD Form 214, "Armed Forces of the United States Report of Transfer or Discharge," will be completed as follows:

a. **Item 11c:**

(1) *Officers*—AFR 36–12, paragraph 16m, (SDN 558), Conscientious Objector.

(2) *Airmen*—AFM 39–10, paragraph 3–8r, (SDN 318), Conscientious Objector.

b. **Item 15.** Enter Code "2" for airmen.

20. Character of Discharge. If discharge is directed, the character of discharge is determined by the member's military record; the standards established in AFR 36–12, or AFM 39–10, as appropriate; and the procedural guidelines in this regulation.

21. Disposition of Correspondence. After final approval action is taken on an application the CBPO Reenlistment and Separations Unit will include one copy of the approved correspondence resulting in discharge in the Unit Personnel Record Group (UPRG). The UPRG will then be sent to USAFMPC/DPMDRR, Randolph AFB TX 78148 accord-

ing to AFM 35–14. One copy of the application, including statement of member resulting in reassignment to noncombatant duties and one copy of all disapproved applications will be filed in the Unit Personnel Record Group in accordance with AFM 35–14. All other copies will be disposed of in accordance with AFM 12–50.

22. Assignment Limitation. CBPO-SA will provide CBPO–ASGN with a copy of the correspondence approving the individual for noncombatant service as a basis for updating the assignment limitation data in the PDS.

23. Notifying Selective Service Regarding a Member Who Has Not Completed 180 Days of Active Duty. Bona fide conscientious objectors (1–0 classification or 1–A–0, but discharge is directed) who are approved for discharge with less than 180 days service, will be discharged for the convenience of the Government by reason of conscientious objection early enough to permit the remaining service in the civilian work program administered by Selective Service. In such cases, the CBPO Special Actions Unit will notify the SSS promptly of the date of discharge from military service and of the fact that the individual has not completed 180 days of active duty. The notification will be prepared for the immediate commander's signature. He will request the SSS to induct the individual for the alternate service provided by the MSS Act.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JOHN D. RYAN, *General, USAF*
Chief of Staff

DWIGHT W. COVELL, *Colonel, USAF*
Director of Administration

Summary of Revised, Deleted, or Added Material

This revision implements DOD Directive 1300.6, 20 August 1971, with changes as follows: defines "religious training and belief" to include moral or ethical beliefs (para 1b); defines "war in any form" (para 5b); provides that applications for noncombatant status will not be accepted unless accompanied by a voluntary request for separation if it is determined that the member cannot be effectively utilized (para 6c); provides for promotion withholding upon submission of application (para 8); requires the appointment of an investigating officer in the grade of major or higher, except for staff judge advocates, which may be in the grade of captain or higher (para 10); requires that a hearing be conducted by the investigating officer (para 10b), during which the applicant may be represented by counsel (para 10b(1)), and may, at his expense, provide for a verbatum record of the hearing (para 10b(4)); requires a comprehensive investigating officer's report and recommendation (para 11); provides for an opportunity for the applicant to comment upon or refute additional information considered which resulted in an adverse decision (para 13); explains that processing of an application need not be abated due to unauthorized absence of applicant (para 14); defines the status of the applicant whose request is under consideration (para 15); and requires members on orders for reassignment to submit application at their next duty station (para 15).

Required Information To Be Supplied by Applicants For Discharge or Noncombatant Service

Each person seeking release from active service from the Air Force or assignment to noncombatant duties, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the Air Force from requiring such additional information as is desired. The individual may submit such other information as desired.

a. General Information Concerning Applicant:

(1) Full name.

(2) Social Security Account Number.

(3) Selective Service number.

(4) Service address.

(5) Permanent home address.

(6) Name and address of each school and college attended (after age 16) together with the dates of attendance, and the type of school (public, church, military, commercial, etc).

(7) A chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college (after age 16) whether for monetary compensation or not. Include the type of work, name of employer, address of employer and the from/to date for each position or job held.

(8) All former addresses (after age 16) and dates of residence at those addresses.

(9) Parent's name and addresses. Indicate whether they are living or deceased.

(10) The religious denomination or sect of both parents.

(11) Was application made to the Selective Service System (local board) for classification as a conscientious objector prior to entry into the Air Force?

To which local board?

What decision was made by the Board, if known?

(12) When the applicant has served less than 180 days in the military service, a statement by him as to whether he is willing to perform work under the Selective Service civilian work program for conscientious objectors, if discharged as a conscientious objector. Also, a statement of the applicant as to whether he consents to the issuance of an order for such work by his local Selective Service Board.

b. Training and Belief:

(1) A description of the nature of the belief which requires the applicant to seek separation from the military service or assignment to noncombatant training and duty for reasons of conscience.

(2) An explanation as to how his beliefs changed or developed, to include an explanation as to what factors (how, when, and from whom or from what source training received and belief acquired) caused the change in or development of conscientious objection beliefs.

(3) An explanation as to when these beliefs became incompatible with military service, and why.

(4) An explanation as to the circumstances, if any, under which the applicant believes in the use of force, and to what extent, under any foreseeable circumstances.

(5) An explanation as to how the applicant's daily life style has changed as a result of his beliefs and what future actions he plans to continue to support his beliefs.

(6) An explanation as to what in applicant's opinion most conspicuously demonstrates the consistency and depth of his beliefs which gave rise to his claim.

c. Participation in Organizations:

(1) Information as to whether applicant has ever been a member of any military organization or establishment before entering upon his present term of service. If so, the name and address of such organization will be given together with reasons why he became a member.

(2) A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

(a) The name of the sect, and the name and location of its governing body or head, if known.

(b) When, where, and how the applicant became a member of said sect or organization.

(c) The name and location of any church, congregation or meeting which the applicant customarily attends, and the extent of the applicant's active participation therein.

(d) The name, title, and present address of the pastor or leader of such church, congregation or meeting.

(e) A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

(3) A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organization.

d. References:

Any additional information, such as letters of reference or official statements of organizations to which the applicant belongs or refers in his application, that the applicant desires to be considered by the authority reviewing his application. The burden is on the applicant to obtain and forward such information.

Statement (Counselling Concerning Veterans Administration Benefits)

I have been advised of the provisions of 38 U.S.C. 3103 concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector under certain conditions. I understand that a discharge as a conscientious objector, who refused to perform military duty or otherwise to comply with lawful orders of competent military authority, shall bar all rights, based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, government (converted) or National Service Life Insurance.

(Date) _____ (Signature of Member) _____

(Typed name, SSAN, grade, USAF) _____

The preceding statement of (member's name) was signed by him after he had been counselled by me.

(Date) _____ (Signature of officer who _____

counselled member) _____

(Typed name, SSAN, grade, USAF) _____

Statement (Counselling Concerning Designation as Conscientious Objector)

1. I have been counselled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector within the meaning of the statute and regulations governing conscientious objectors and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntarily enlistment, re-enlistment, or active service in the armed forces.

2. If I am determined to be a conscientious objector (I–A–0 status) and if a further determination is made by HQ USAF that I cannot be effectively utilized as a noncombatant, I am requesting that (I be discharged for the convenience of the Government in accordance with paragraph 3–8r AFM 39–10 (airmen)) (my resignation be accepted in accordance with paragraph 16m, AFR 36–12 (Officer)).

(Date) _____ (Signature of Member) _____

(Typed name, SSAN, grade, USAF) _____

The preceding statement of (member's name) was signed by him after he had been counselled by me.

(Date) _____ (Signature of officer who counselled member) _____

(Typed name, SSAN, Grade, USAF) _____